Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06606/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 April 2016	**On 19 May 2016**

Before

UPPER TRIBUNAL JUDGE WARR

Between

NAZ WALI KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – ISLAMABAD

Respondent

Representation:
For the Appellant: Mr T Gaisford of Counsel instructed by Nandy & Co
For the Respondent: Mr N Bramble

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 5 December 1969. He appeals the decision of the respondent on 1 May 2014 to refuse his application for entry clearance as the husband of the sponsor, Ms Saleh.

2. The appellant had arrived in this country on a visit visa in March 2006. He had remained in the UK after the expiry of his visit visa in July of that year. He met the sponsor who had indefinite leave to remain in the UK in 2007. He had applied for leave to remain in the UK as her partner in 2011. That application was unsuccessful and an appeal against that decision was dismissed by Designated Judge Lewis following a hearing on 8 May 2012.

© CROWN COPYRIGHT 2016

The appellant returned to Pakistan in 2013 to make the application which is the subject of these proceedings.

3. The sponsor attended the proceedings before the First-tier Judge. However she was unable to communicate with the interpreter as she spoke a different dialect to that of the interpreter. There had been a previous adjournment of the appeal on 9 March 2015. Mr Gaisford appeared before the First-tier Judge as he did before me and requested that the case should be dealt with on the basis of the papers and submissions. The previous decision of the Designated Judge was before the Tribunal and the issues were limited to ones concerning the English qualification and the marriage certificate. The Home Office representative accepted that the case could proceed on that basis. The judge records as follows:

> "Taking into account the fact that both representatives were prepared to proceed on this basis and being aware of the delay which had already been experienced because of the previous adjournment I agreed to proceed by way of submissions, having regard to the overriding interests of justice and fairness."

The judge summarised the reasons for refusal in paragraph 10 of her decision. The respondent took the point that the appellant was required to satisfy the English language requirement in paragraph E-ECP.4.2 of the Immigration Rules but had failed to do so prior to the date of refusal on 1 May 2014. I should interpolate that the appellant had submitted an English language certificate with his appeal dated 30 July 2014 following an examination taken in June 2014.

4. The respondent was not satisfied that the death certificate relating to the death of the appellant's first wife, Umbar Ali, was valid and therefore the respondent did not accept that the appellant's marriage to Ms Saleh was valid. In relation to this point the judge did not find it necessary to make any findings.

5. In relation to Article 8 the respondent accepted there was a subsisting relationship between the parties. However there was no apparent bar to the sponsor moving to Pakistan bearing in mind that at the time the parties entered into their relationship the appellant was an overstayer. The decision was proportionate.

6. Having considered the submissions the judge found no reason to doubt the assessment of Judge Lewis that:

> "a. The appellant knowingly overstayed in the UK and did not attempt to regularise his position until 2010 at the earliest;
>
> b. The appellant had an economically established family in Pakistan in 2012 and his relationship with them at that time was good;
>
> c. Apart from his family life with his wife, the nature and quality of his private life in the UK was tenuous, comprising one educational qualification and some unlawful working;

d. The appellant and his wife intended to live together permanently in 2012 and he could satisfy the English language, maintenance and accommodation requirements of the Immigration Rules at that time."

On the issue of the English language qualification requirement the judge found in paragraph 30 that as the appeal was an out of country appeal she could only consider the circumstances at the date of the respondent's decision which was 1 May 2014 and could not take into account the later English examination. As a result the appellant's appeal under the Rules did not succeed. The judge then turned to consider Article 8 outside the Rules and referred to the questions set out in **Razgar v Secretary of State [2004] UKHL 27**. The judge answered the first three questions set out in **Razgar** in the affirmative and found in relation to question four that it would be in furtherance of the permitted aim to impose the English language requirements. In relation to the issue of proportionality the judge reminded herself to consider the effects not only on the appellant but also on his wife. The judge concluded her determination as follows:

"45. I find that the family life of the Appellant and Ms Saleh could reasonably be expected to be enjoyed in Pakistan. The Appellant had an economically established family in Pakistan in 2012 with whom he had good relations and there is nothing in the evidence to lead me to conclude that this position has changed. Ms Saleh is not a British citizen. In 2012 Designated Judge Lewis found that she had visited the Appellant's family and had found them to be extremely lovely people although with different customs and cultures. Again the evidence does not lead me to find that this has changed. She arrived in the UK on 18 July 2004 (according to the Appellant's entry clearance application). Her date of birth is 5 December 1969 and she was born in Indonesia. She has therefore adapted to a change in culture and customs previously when she moved to the UK at the age of 34 and I see no reason why she could not do so again. She is only 45 years old and there is no evidence of any health issues which would cause her problems if she were to move to Pakistan. Beyond evidence of employment there is no evidence of Ms Saleh having other ties in the UK which would impact upon her ability to move to Pakistan.

46. Section 117B NIAA sets out specific public interest considerations which I must consider in carrying out the proportionality assessment. The Appellant is able to speak English to an extent. Although he was unable to satisfy the changed requirements of the Immigration Rules in 2014 as at 1 May 2014, he was able to study for and obtain an entry level Certificate in ESOL Skills for Life (Speaking and Listening) (Entry 2) as found by Judge Lewis.

47. In relation to the financial independence test in Section 117B the Appellant satisfied the Respondent that his sponsor met the financial requirements of the Immigration Rules. His wife has the means to support him and therefore he would not be a burden on taxpayers.

48. However, Section 117B(4) provides that little weight should be given to a relationship formed with a qualifying partner where it is established by a person when they are in the UK unlawfully. "Qualifying partner" is defined to include "settled" persons and "settled" is defined under

Section 33(2A) Immigration Act 1971 as persons who are ordinarily resident in the UK without any restriction under the immigration laws on the period for which they may remain. Ms Saleh has indefinite leave to remain in the UK and is ordinarily resident in the UK. She is therefore a qualifying person.

49. The Appellant met Ms Saleh in December 2007 and their relationship has developed since that time. That period is entirely after his visit visa had expired on 19 July 2006. He was therefore in the UK unlawfully when his relationship with Ms Saleh was established. I am therefore required to give little weight to that relationship.

50. Mr Gaisford referred me to the case of Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC). That case does not assist the Appellant. It concerned a situation where the tribunal did not have jurisdiction to consider the Immigration Rules and it was decided that being able to satisfy the Immigration Rules is a weighty matter to be taken into account in the Article 8 analysis. That situation does not apply here. I have been able to consider the Appellant's case under the Immigration Rules and he does not satisfy those Rules. However, I have been able to take into account his ability to speak English in the proportionality exercise notwithstanding the failure to meet the specific requirement of the Immigration Rules as at 1 May 2014.

51. I have weighed up all these facts and conclude that, considering the ability of the Appellant and Ms Saleh to carry on their life together in Pakistan, the little weight I can give to their relationship and the public interest in the maintenance of effective immigration controls, the decision taken by the Respondent is necessary and proportionate."

7. Permission to appeal was granted by the First-tier Tribunal on 12 February 2016 on the basis that it was arguable that the judge did not conduct a sufficient analysis of the evidence adduced by the appellant in relation to the English language certificate and it was arguable in the light of the provisions of Section 117 that the judge "should have furnished greater clarity in this respect". It was further arguable that the judge had made insufficient findings of fact in the context of the ability of the appellant's wife to adapt to life in Pakistan. The respondent in the response submitted that the ground in relation to the English language certificate was misconceived in that Section 85(5) of the 2002 Act applied and postdecision evidence should not have been considered in the light of **AS (Somalia) [2008] EWCA Civ 149**. Reference was made to paragraph 18 where it was pointed out that in overseas appeals a fresh application could be made relying on any human rights based points. The judge had correctly taken into account the appellant's ability to speak English as well as his failure to provide an English language certificate. The ability to speak the English language was a neutral consideration at best following the decision of **AM (Malawi) [2015] UKUT 0260 (IAC)**. The judge had considered all relevant circumstances when considering whether family life could reasonably be enjoyed in Pakistan and the grounds were a mere expression of disagreement with the judge's conclusions. In ground 5 (which took issue with the last sentence of paragraph 45 of the

determination) it had been conceded in the grounds that the statement may have been "fairly generic" in nature.

8. Mr Gaisford submitted that evidence had been excluded. He referred to the grounds and the fact that the appellant had taken the exam and passed it was a matter of residual evidence and should be taken into account. No reference had been made to EX.1 in Appendix FM. It was acknowledged that this point had not been taken in the grounds. The sponsor had not given evidence and had only provided a statement and the appeal had had to be adjourned on two occasions. The Entry Clearance Officer could have taken into account the appellant's English qualification and it would be disproportionate to require a fresh application to be made. Counsel referred to **SS (Congo) v Secretary of State [2015] EWCA Civ 387** at paragraphs 54 to 56 and what was said about near miss cases.

9. Mr Bramble submitted in response that the arguments had moved on considerably from the grounds upon which permission had been granted. He relied on the Rule 24 response and submitted there was nothing untoward in it being decided that the case could proceed on submissions. It was a straightforward case. Mr Gaisford submitted in reply that it was **Robinson** obvious that the sponsor would have established a private life in the UK.

10. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision of the First-tier Judge if it was materially flawed in law.

11. At that hearing the appellant was represented by Mr Gaisford and Mr Gaisford settled the grounds of appeal to the Upper Tribunal. It was Counsel's decision to proceed with the hearing notwithstanding the interpreter difficulties. The process was entirely fair. At the hearing before me Counsel sought, as Mr Bramble commented to widen the grounds considerably from the initial grounds settled by Counsel. There had been no attempt in advance of the hearing to raise additional points. I see no reason to admit further arguments that had not been employed before and such arguments were not "Robinson" obvious: **R v Secretary of State ex parte Robinson [1997] Imm. A.R. 568.**

12. I find that the First-tier Judge was correct in concluding that she could only take into account the circumstances as at the date of the respondent's decision and could not take into account the later English exam. She did not accordingly err in finding that the appellant's appeal under the Immigration Rules could not succeed. She then conducted a full review of the appellant's Article 8 appeal outside the Immigration Rules, correctly addressing herself to the questions in **Razgar**. She bore in mind the effect of the decision on the appellant and the sponsor. She took into account the findings that had been made by Designated Judge Lewis. Although she had properly decided not to admit the evidence of the English exam in relation to the immigration decision, she considered the ability of the

appellant to speak English in the context of Section 117B and the financial requirements.

13. She also took into account that the relationship with the sponsor had been established at a time when the appellant had been in the UK unlawfully. She makes it quite clear that she had in mind the appellant's ability to speak English notwithstanding the failure to meet the specific requirements of the Rules.

14. I agree with Mr Bramble and the points made in the respondent's response that the arguments advanced go little further than expressing disagreement with the decision of the First-tier Judge. I see no evidence that the First-tier Judge did not take into account all the available evidence including the sponsor's witness statement. There was no procedural unfairness in this case. The appellant's interests were protected by Counsel who took an advised decision to proceed with the hearing notwithstanding the interpreter difficulties.

15. I find that the First-tier Judge carefully considered all the relevant evidence and reached proper conclusions on it. She did not arguably misdirect herself in concluding as she did and I accept the arguments advanced by the respondent and as deployed by Mr Bramble. The grounds of appeal do not disclose a material error of law on the part of the First-tier Judge. Accordingly, this appeal is dismissed and the decision of the First-tier Judge stands.

Anonymity Direction

16. The First-tier Judge made no anonymity order and I make none.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date 13 April 2016

G Warr
Judge of the Upper Tribunal